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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 813 & No. 826

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY
(a corporation), Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE, *Petitioners,*

vs.

WESTERN PACIFIC RAILROAD CORPORATION (a corporation), et al. *Respondents.*

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company (a corporation), dated June 26, 1916, *Petitioners,*

vs.

WESTERN PACIFIC RAILROAD CORPORATION (a corporation), et al., *Respondents.*

BRIEF OF THE WESTERN PACIFIC RAILROAD CORPORATION IN OPPOSITION TO PETITIONS OF FREDERICK H. ECKER, ET AL. CONSTITUTING THE INSTITUTIONAL BONDHOLDERS' COMMITTEE, AND OF CROCKER FIRST NATIONAL BANK ET AL., AS TRUSTEES, FOR WRITS OF CERTIORARI.

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OCTOBER TERM, 1941

No. 819 No. 820

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Two petitions for certiorari have been filed, one by the Institutional Bondholders' Committee and the other by the Trustees under The Western Pacific Railroad Company's First Mortgage. The two petitions raise substantially the same points, and the second, in large part, refers to, and relies upon, the first. In this brief, therefore, we shall seek to oppose both petitions.

The Western Pacific Railroad Corporation, which presents this brief, is the owner of substantially all the unsecured claims against the debtor, and is the holder of all the stock, preferred and common, of the debtor. By the Plan of Reorganization it is excluded, in each of these capacities, from participation in the reorganized company.

GROUNDS OF THE PETITIONS FOR CERTIORARI.

Both petitions for certiorari claim, as their principal grounds, that the decision (a) is "in conflict with applicable decisions of this court"; or (b) "has decided an important question of federal law which has not been, but should be, settled by this court"; or (c) is "in conflict with the decision of another Circuit Court of Appeals".[1]

We direct our attention, first, to the contentions of the petitioners just outlined.[2]

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1. These grounds are among those listed in the Rules of the Supreme Court as indicating, though not controlling this Court's discretion, reasons which will be considered upon petition for certiorari. Rule 38, 5(b).

2. Other and, we submit, subsidiary reasons advanced for granting the writ will be discussed later.

I.

IN EVERY MATERIAL RESPECT, THE DECISION OF THE CIRCUIT COURT OF APPEALS FOLLOWS, AND IS SUPPORTED BY, DECISIONS OF THIS COURT. IT HAS NOT DECIDED ANY IMPORTANT QUESTION NOT SETTLED BY THIS COURT. IT IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS.

What Did the Circuit Court of Appeals Decide?

Considering the complexity of the facts involved in a proceeding for the reorganization of a railroad, the opinion of the Circuit Court of Appeals[3] is brief and simple. In substance it lays down these propositions:

1. If (as was and is claimed by The Western Pacific Railroad Corporation[4] in its objections to the Plan) the debtor was not insolvent, but had property of a value in excess of its liabilities, the exclusion of that corporation from participation is unfair and inequitable.[5]

2. To determine the question raised by the foregoing objection of WP Corp. it was necessary to determine the value of the debtor's property. In support of this declaration the opinion cites *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 517-525.

3. RFC, RCC, ACJ and the holders of outstanding first mortgage bonds were holders of secured claims. The opinion of the Circuit Court of Appeals, after pointing out that their right to participate in the reorganization is conceded, declares that "fairness requires that their

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3. R. pages 2663-2674.

4. We shall refer to this respondent as "WP Corp." and to other parties by the abbreviations indicated on page 5, note 2, of the petition for certiorari of Ecker et al.

5. This proposition is, we submit, axiomatic. It is not questioned in either petition for certiorari.

participation should be in proportion to the value of their respective claims". To determine whether the Plan met this requirement, it was necessary to determine the value of the debtor's entire property, of each of the claims of each of these creditors, of the new securities to be issued on reorganization, of the property subject to each of the existing mortgages, and of the refunding bonds pledged to secure the claims of ACJ, RCC and RFC. To determine the value of the refunding bonds, it was necessary to determine the value of (1) the property subject to the refunding mortgage only; and (2) the property subject to both mortgages. This necessitated a determination as to which of the debtor's property is, and which is not, subject to each mortgage. To this declaration (i. e., of the necessity of determining values) the *Consolidated Rock Products* case is again cited as authority.

4. Subsection (e) of Section 77 provides that "if it shall be necessary to determine the value of any property for any purpose under this section, the Commission[6] shall determine such value and certify the same to the Court in its report on the plan". It being, as already held, necessary to determine the value of various items, it became the duty of the Commission to determine these values and certify them to the Court. That duty was not performed.

5. Lacking the requisite valuation data, the Court was in no position to exercise the "informed, independent judgment" which appraisal of the fairness of a plan of reorganization entails (citing the *Consolidated Rock Products* case, supra, and other cases).

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6. i. e., the Interstate Commerce Commission.

6. Instead of approving the plan the District Court should have entered an order dismissing the proceeding, or, in its discretion and on motion of any party in interest, referred the proceeding back to the Commission for further action.[7]

7. In determining whether a plan satisfies the requirements of subsection (e) of Section 77, the Court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment, whether the determination relates to value or to some other subject, although the duty of determining value rests initially on the Commission.

The foregoing summary includes substantially everything decided by the Circuit Court of Appeals in its opinion. It is submitted that there is nothing so decided which is not either in clear accord with the provisions of Section 77, or with the applicable decisions of this Court.

Before Approving a Plan of Reorganization, the Court Must Exercise an "Informed, Independent Judgment" on the Question Whether the Plan Is Fair and Equitable.

The rule stated in the foregoing heading is settled by repeated decisions of this Court. It has been applied in equity receiverships, as well as in reorganization proceedings under Section 77B of the Bankruptcy Act.

National Surety Co. v. Coriell, 289 U. S. 426, 436;
First National Bank v. Flershem, 290 U. S. 504, 525;

7. The order suggested as proper was embodied in the remand of the proceeding. It is in accord with subsection (e) of Section 77.

Case v. L. A. Lumber Products Co., 308 U. S. 106, 115;

Consolidated Rock Products Co. v. DuBois, supra.

See, also,

Tennessee Publishing Co. v. American National Bank, 299 U. S. 18, 22.

The provision of Section 77 is at least as strong and direct in this respect as was the provision of Section 77B.[8] Both petitions argue[9] that under subsection (d) of Section 77 the Commission has primary jurisdiction to determine whether a plan "will be compatible with the public interest", and that this includes jurisdiction "to determine total capitalization, the classification thereof, and the financial details of each class of proposed capitalization".[10] If the question were material, we would challenge, as we did in the Court below, the broad scope thus given to the "public interest" provision, as unsupported by any authority. The question does not, however, arise here. There is no reference to it in the opinion of the Circuit Court of Appeals.

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8. Section 77B(f) provided that "the Judge shall confirm the plan if satisfied (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible * * *." Section 77, subsection (e), provides that "the Judge shall approve the plan if satisfied that (1) it * * * is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders * * *."

9. Petition of Ecker et al. (pp. 25, 38-39); petition of Crocker Bank et al., as trustees (p. 5).

10. Petition of Ecker et al., page 25.

At any rate, whatever may be the extent of the Commission's authority over questions of "public interest", it is certainly clear that the Court must exercise its "informed, independent judgment" on every factor bearing on the fairness and equity of the plan. The proposed capitalization, and the details thereof, may be entirely compatible with the "public interest", but the Court must still determine, independently, whether, under such capitalization, the reorganization would be unfair or inequitable, or would discriminate unfairly in favor of any class of creditors or stockholders.

What has just been said indicates, as well, the answer to the criticism directed by the petition of Crocker Bank et al.,[11] and (inferentially perhaps) by the petition of Ecker et al.,[12] against the declaration in the opinion of the Court below[13] that the duty of determining value, where such determination is necessary, rests initially on the Commission, but that the Court must exercise its independent judgment on this, as on any other subject involved in deciding whether the plan satisfies the requirements of subsection (e). (These requirements include fairness and equity, want of unfair discrimination and conformity to the law of the land.) The question seems somewhat remote or abstract in the present case, where the Commission failed to make any determinations of value. But, regardless of this, how can the Court reach an informed, independent judgment that a plan is fair

11. Page 9.
12. Pages 38-39.
13. 7 in foregoing summary under head "What did the Circuit Court of Appeals decide?"

and equitable if it must accept as final the Commission's determinations of value—determinations which lie at the very base of an inquiry into the fairness and equity of the plan. We do not question that great weight and respect should be accorded to the views of an expert administrative body like the Interstate Commerce Commission, but the Court must still be "satisfied" with the findings of value before it can be "satisfied" that the plan is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class, and will conform to the law of the land.[14]

Findings of Value Essential to Enable Court to Exercise "Informed, Independent Judgment".

The findings which the Circuit Court of Appeals held to be necessary (and to be lacking) are set forth under 2 and 3[15] of the foregoing summary entitled "What did the Circuit Court of Appeals decide?".

The necessity for such findings is clearly and definitely decided by this Court in *Consolidated Rock Products* case supra.

We make no point on any verbal or formal definition of the word "finding". All that we claim is that before the District Court can approve a plan as fair and equitable, it must have before it an "ascertainment" or "appraisal"

14. Regardless of the general rules with respect to the force of administrative findings, the Court must weigh the facts independently where there is a claim of confiscation or other invasion of constitutional right. (*St. Joseph Stockyards Co. v. U. S.*, 298 U. S. 38; *Baltimore & O. R. Co. v. U. S.*, 298 U. S. 347.)

15. Ante, pages 3, 4.

or "determination" of the values which underlie the plan. The Circuit Court of Appeals uses the word "determination". This Court, in the *Consolidated Rock Products* case, speaks of "findings".

The petitions for certiorari[16] stress the following language of the opinion of the Circuit Court of Appeals: "Lacking the requisite valuation data, the Court was in no position to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails". Except for the substitution of the word "Lacking" for the word "Absent", the sentence is an exact quotation from the opinion of this Court in the *Consolidated Rock Products* case.[17] From this language the petitioners, it would seem, seek to draw the inference that determinations or findings of value are not necessary if the record contains the basic data upon which such a finding or determination might have been made. There are two conclusive answers to this proposition:

(1) Unquestionably the record before the Commission contained a mass of data comprising an evidentiary basis upon which the Commission might have determined the value of the property. On this basis any one of a great variety of figures might have been fixed as representing the value. To appraise the value from this mass of data—investment, valuations under Section 19(a), past earnings, financial history, physical condition, and other elements—required the exercise of judgment and

16. Petition of Ecker et al., pages 34-35; petition of Crocker Bank et al., page 2.

17. 312 U. S. at 520.

discretion resulting in a final determination of value[18] Such determination not having been made, either by the Commission or the Court, it is of no consequence that the record contained material upon which it could have been made.

(2) The isolated expression "Absent the requisite valuation data" from the opinion in the *Consolidated Rock Products* case, supra, falls far short of presenting the true holdings of that decision. In further passages the necessity of "findings" of value is repeated and emphasized. At page 520 the Court says: "In the first place there must be a determination of what assets are subject to the payment of the respective claims". Again, at page 524: "We have already noted that no adequate finding was made as to the value of the assets of Consolidated. In view of what we have said it is apparent that a determination of that value must be made so that criteria will be available to determine an appropriate allocation of new securities between bondholders and stockholders in case there is an equity remaining after the bondholders have been made whole". And, again, at page 525: "Findings as to the earning capacity of an enterprise are essential to a determination of the feasibility as well as the fairness of a plan of reorganization".

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18. "The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rate. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property." (*Rowley v. C. & N. W. R. Co.*, 293 U. S. 102, 109.)

On the necessity for findings on the elements of value discussed above, the decision of the Circuit Court of Appeals for the Seventh Circuit in re *Chicago, Milwaukee, St. Paul and Pacific R. R. Co.*[19] is in harmony, and not in conflict, with the decision of the Court below.

The opinion of the Court below in its holding that findings or determination of value and of elements of value are essential, relied upon and followed the decision of this Court in *Consolidated Rock Products* case. The opinion in the *Chicago, Milwaukee etc.* case takes the same course. The following quotations illustrate the closeness with which the Circuit Court of Appeals of the Seventh Circuit, like the Court below, guided its action by the opinion of this Court in the *Consolidated Rock Products* case.

> "The court in Consolidated Rock Products Co. v. Du Bois, infra, has pointed the way and laid down the applicable rules for our guidance. * * *
>
> "That it must be our text for determining the disposition of this appeal is quite clear.
>
> "The Consolidated Rock Products Company case, the Boyd case, and the Los Angeles Lumber Co. case[20] infra, read together, lay down the rules governing simple, as well as the fact-complicated reorganizations.
>
> "The Consolidated Rock Products case contains a complete statement of the applicable reorganization rules."

19. Decided December 4, 1941—not yet reported.
20. *Northern Pac. R. Co. v. Boyd*, 228 U. S. 482; *Case v. L. A. Lumber Products Co.*, 308 U. S. 106.

The opinion in the *Chicago, Milwaukee etc.* case then goes on to summarize the holdings of the *Consolidated Rock Products* case. One of these is stated as follows:

> "(j) Findings must be made on all vital issues, controverted and uncontroverted, and must include values of properties separately considered *and also of Debtor's property as a whole.* Findings must cover values of liens to be surrendered and values of securities given in exchange. They should specifically cover the ultimate (not evidentiary facts) facts upon which the values are based. They must show that fixed interest charges are included and show that values are based on income-producing factors." (Italics ours.)

The Record Contains No "Findings" or "Determinations" of Value.

The lack of necessary findings of value is admitted in the petitions for certiorari, in the one case directly, and in the other inferentially.[21] The petition of Ecker et al.[22] states "The Commission did not specifically find any certain and absolute value in terms of dollars and cents for all or any part of the Debtor's property, for any of the existing claims against or interests in the Debtor, or for any of the new securities contemplated by the Commission plan".

Both petitions refer repeatedly to "dollars and cents valuations" or "exact dollar valuations", or like expressions,[23] in the effort to show that no such valuations are required.

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21. Petition of Crocker Bank et al., pages 2, 4, 6, 7.
22. Page 19.
23. Petition of Ecker et al., pages 22, 24, 25, 28, 29, 30, 31, 33, 34, 37; petition of Crocker Bank et al., pages 4, 6, 7.

We know of no way in which the "value" of property (whether it be "market value" or "fair value" or "cash value" or value for purposes of taxation, or rate-making or reorganization) is to be measured or expressed otherwise than in terms of money, and that means (in the United States) in terms of dollars. We have already quoted[24] a passage from the opinion of this Court in *Rowley v. C. & N. W. R. Co.*, 293 U. S. 109, where the opinion treats the "actual value" of railroad property as synonymous with its "money equivalent".

What, in the judgment of the Commission, was the value (in dollars) of the debtor's entire property, of the property subject to the first mortgage, of the property, if any, subject to the refunding mortgage, or of the new securities to be issued? What did the Commission find or estimate to be the earning capacity of the railroad?[25] The record furnishes no answer to any of these questions.

The Requirement of a Finding or Determination of the Value of the Entire Property Is Not Satisfied by the Commission's Findings that "the Equity in the Existing Stock Has No Value" and that "the Claims of the Unsecured Creditors Have No Value".[26]

These findings are not specifically mentioned or discussed in the opinion of the Court below. That Court contented itself with declaring, in accord with the ruling of this Court in *Consolidated Rock Products* case, that in the face of a claim by unsecured creditors and stockholders that the value of the property was more than suf-

24. Ante, page 10.
25. See *Consolidated Rock Products Co. v. DuBois*, 312 U. S. at 525.
26. R. 269-270.

ficient to fully provide for all prior claims, the plan could not be approved as fair and equitable in the absence of a determination of the value of the debtor's property. We submit that in this the Court was clearly right.

As we have pointed out, both this Court in the *Consolidated Rock Products* case and the Circuit Court of Appeals for the Seventh Circuit in the *Chicago, Milwaukee, etc.* case held that a determination of the value of the entire property was essential. That requirement is not met by the mere declaration of the legal conclusion that the stock equity or the claims of unsecured creditors are without value. There is no way in which the District Court can measure or test the propriety or soundness of this conclusion in the absence of some basis of knowledge of the value of the property.

In their effort to maintain the adequacy, as support for the exclusion of unsecured claims and stock equity, of the findings that such claims and equity "have no value"[27] the petitions rely on *In re 620 Church Street Building Corp.*, 299 U. S. 24, and on Section 77(e).

(a) In the *Church Street* case (a proceeding under Section 77B) the Court was not confronted with a bare ultimate conclusion of "no value" in the junior mortgages or the stock equity. The findings of the trial Court are set forth in the opinion of this Court. They declare that debtor's property had a fair market value of $245,025 and that the amount of the first mortgage bonds was $445,500. These specific determinations obviously justi-

27. Petition of Ecker et al., pages 23-24, 29; Petition of Crocker et al., pages 6, 15, 16.

fied—indeed, required—the conclusions that the claims of junior mortgages had no value, and that there was no equity above the first mortgage. In the instant case, there was no finding or determination of the value of the debtor's property, and no basis, therefore, upon which the Court could exercise an "informed, independent judgment" on the presence or absence of value in the unsecured claims or the stock.

(b) The provision of subsection (e) relating to findings that the equity of stockholders or the interests of a class of creditors have no value, applies solely to the submission of the plan, after it shall have been approved, to classes of creditors or stockholders for acceptance or rejection. Findings of no value are significant only as justifying the exclusion of classes from the right to vote. They have no relation to the necessary determinations of value which are a prerequisite to the Court's approval of a plan—an approval which precedes the submission for acceptance or rejection.

It is contended by petitioners that in the *Chicago, Milwaukee, etc.* case, supra, the Circuit Court of Appeals for the Seventh Circuit regarded a finding that the equity of the stock had no value as sufficient to authorize the exclusion of the stock interest.[27a] If this be a correct interpretation of the opinion, it is still to be borne in mind that that Court insisted on the necessity for a finding of the value of debtor's property as a whole. Furthermore, in

27a. Press reports show that on January 13, 1942, after this brief had gone to the printer, the Circuit Court of Appeals (7th) filed a "supplementary opinion" in the *Chicago, Milwaukee, etc.* case decided by it on December 8, 1941. The full text is not available to us. Comment on the press report of the supplementary opinion is contained in an appendix to this brief.

the *Milwaukee* case, the "finding" of no value in the stock equity was supported (as it is not here) by findings which the Court regarded as adequate, independent findings of value. The opinion refers to the "substitute finding of capitalization figure which was arrived at by using as a basis the average annual sum available for fixed charges". If (which we do not concede) the total of the authorized capital of the reorganized company may be taken as a finding that the value of the debtor's entire assets is such total amount, the record in this case fails to show any specific amount of total capitalization authorized. The proposed new capital structure includes 319,441 shares of capital stock without par value[28]. In the plan itself, no value was assigned to these shares.[29] They were allocated to first mortgage bondholders and to RFC at $57, to RCC at $62, and to ACJ at no specific rate. The result is there is no way of measuring the amount of total capitalization. The petition of Ecker et al. argues[30] that the designation and allocation of the new capitalization was, in effect, a finding that the property and new securities had a value not in excess of $84,027,599—i.e., the aggregate of the new securities having a principal amount or par value, plus the 319,441 shares of common stock taken at $57 per share. But why $57, rather than $62, or some other amount?

28. Petition of Ecker et al., page 6.

29. There are, however, various passages in the Commission's reports indicating that these shares were "treated • • • at $100 per share" (R. pp. 244-45, 256, 259, 359). If so treated the total capitalization would amount to $97,763,522, or some $10,000,000 more than the aggregate of the secured claims and undisturbed obligations recognized under the plan.

30. Pages 35-36.

On the other hand, the plan in the *Milwaukee* case[31] set forth a total authorized capitalization in the specific sum of $548,533,321, which included no par common stock "shown at $100 per share".

The Decision of the Court Below Is Not in Conflict With the Requirements of the Absolute Priority Rule or With the Necessity For Maintaining the Relative Priorities.

At no time during the progress of this litigation has the WP Corp. questioned or disputed the propositions that creditors holding prior secured claims are entitled to satisfaction out of the assets in preference to holders of junior secured claims, or that the latter are entitled to satisfaction before any recognition can be given to unsecured creditors, or that the latter must receive due recognition before anything can be allotted to stockholders. Nor is the decision of the Court below inconsistent with established rules of priority.

The petitions for certiorari base their claim of conflict entirely upon the statement in the opinion of the Court below that "fairness requires that their (the secured creditors') participation should be in proportion to the value of their respective claims".[32] We confess our inability to understand why this statement in any way conflicts with the rights of secured creditors to either absolute or relative priority. We see no basis for the contention of petitioners that the quoted sentence "if taken literally"[33] means or that it "apparently requires"[34] that

31 See opinion of District Court, 36 Fed. Supp. 193, at 217.
32. Petition of Ecker et al., pages 30-32; Petition of Crocker et al., pages 4-5, 7-8, 16-18.
33. Petition of Ecker et al., page 33.
34. Petition of Crocker Bank et al., page 7.

the new securities are to be allocated to secured creditors in the exact mathematical proportions of the values, in dollars, of their respective claims. Those values are dependent, largely, upon earning power,[35] and the valuation of secured claims, as well as of the new securities to be allocated, must necessarily take into account the "varying levels of venture earnings" at which the assets securing the different claims, as well as the different new securities, "begin to show earning power".[36] To say, as the Court below said, that the participation of secured creditors should be "in proportion to the value of their respective claims" does not mean, therefore, that the allocation of new securities must be based on an exact mathematical formula which regards only the determined dollar values. A distribution which recognizes the earning levels at which existing securities, as well as new securities, "begin to show earning power" would be in proportion to the values of the secured claims.

We submit that the supposed conflict of the decision of the Court below with the *Consolidated Rock Products* case, with *Case v. L. A. Lumber Products Co.*, supra, or with decisions of Circuit Courts of Appeals does not exist, and that the argument that there is such conflict rests upon an attempt to expand and distort the language of the Court below by reading into it something which was neither stated nor intended by the Court.

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35. Under the last paragraph of subsection (e), earning power is not the sole, though perhaps the dominant, element, in determining value of property for any purpose under Section 77.

36. The words quoted are found in the Petition of Ecker et al., page 31.

II.

FURTHER REASONS ASSIGNED BY PETITIONERS FOR THE GRANTING OF CERTIORARI.

Costs.

Complaint is made[37] that costs of appeal were assessed against the appellees.

There is no reference to costs in the opinion of the Court below. The allowance of costs to the appellants followed automatically from Rule 27 of the Rules of the Ninth Circuit which provides: "In cases of reversal of any judgment or decree in this court costs shall be allowed to the appellant, including the cost of the transcript from the court below, unless otherwise ordered by the court." The rules of every other Circuit contain identical or similar provisions, as do the rules of this Court. The most, then, that can be said is that the Court below would have had discretion to relieve the appellees from costs, notwithstanding the reversal. It does not appear that the Court was asked to do so.

Was the failure to make an order varying the consequence which would normally flow from Rule 27 an abuse of discretion? Clearly, we submit, it was not. No good reason is suggested why claimants who attempt, without success, to sustain a plan of reorganization (which, presumably, they deem beneficial to them) should be preferred, in the matter of costs, to claimants who have succeeded in maintaining their objections to the plan.

But beyond this, the determination by the Court below, in its discretion, that costs should or should not be allowed to the prevailing party does not appear to present an

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37. Petition of Ecker et al., pages 26, 43, 44; Petition of Crocker Bank et al., page 10.

"important question of federal law" which would justify the granting of a writ of certiorari.

Other Railroad Reorganization Plans Formulated by the Commission.

The petition of Ecker et al.[38] points out that the Commission has formulated plans of reorganization for fifteen Class I railroads (including the Western Pacific) and claims that in all of these the findings of the Commission were "substantially identical in character" with those found by the Court below to be inadequate.

Some of these plans have been approved by District Courts. If time and space permitted we could show that the plans which have been approved in the District Court cases cited by this petitioner were supported by findings substantially different from those of the present case.[39] But an analysis of the records in other cases would be useless. The only case (other than this one) which has reached a Circuit Court of Appeals is *In re Chicago, Milwaukee, etc. R. R. Co.* already referred to, and in that case, as in this one, the order approving the plan was reversed for want of adequate "findings" or "determinations" of value. The reversal in each case was based upon the holdings of this Court in the *Consolidated Rock Products* case, which was decided on March 3, 1941, long after the Commission had certified its fifteen plans of reorganization to which the petition of Ecker et al. refers, and after the District Courts (including the Court which made the order of approval here involved) had acted in approving various plans of reorganization certified to them.

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38. Pages 26-27.

39. That is not to say that even in those cases the findings could be held adequate under the law laid down in the *Consolidated Rock Products* case.

It is unfortunate that time and labor may have been lost, and that further time and effort may be required to enable the Commission to certify plans which can properly be approved by District Courts, but if this is the necessary result of the law as laid down by this Court, that condition cannot be altered or ameliorated by this Court's ordering up the instant case in order to again decide what it has already decided.

General Considerations.

The petitions for certiorari urge two grounds which appear to us to have little, if any, relation to the considerations which actuate this Court in ordering up cases for its own review.

In the first place, attention is called to the purpose, underlying the enactment of Section 77, of expediting proceedings for the reorganization of railroads.[40] No one can question the desirability of a prompt and speedy disposition of reorganization proceedings. If, however, as we believe, the decision of the Court below is sound and is in accordance with the holdings of this Court in prior cases, the case must in any event be remanded to the District Court for such further proceedings as it may take under the statute. That Court would presumably, on motion of any party in interest, refer the proceedings back to the Commission for further action. We fail to see how an expeditious disposition of the proceeding would be furthered by delaying such reference to the Commission until these appeals may be heard, considered and decided by this Court.

40. *Continental etc. B. & T. Co. v. Chicago, etc. Ry.*, 294 U. S. 648.

Secondly, it is urged that certiorari should be granted because of the importance of a determination of all questions that have been raised or may ultimately be raised in this case, and so that many questions involved in the construction and application of Section 77 may be decided for the guidance of lower Courts, of the Commission, and of parties in other proceedings for reorganization.

It has long been the practice of appellate (and other) Courts to limit their decisions to questions necessarily involved in disposing of the particular matters brought before them. Without going into the cogent reasons for this settled rule, it may be pointed out that Section 77 is a long and involved statute, and that there is a real danger of confusion, and, perhaps, of error, in undertaking to go beyond the necessities of a particular case in the effort to clear up doubts which may arise at a later stage in the same case or in other cases. No one, we think, can foresee all the problems that may be presented in proceedings under Section 77, and it would, we believe, be vain to hope that a decision in any one case can so clarify the situation as to avoid future doubts and future appeals.

Dated, San Francisco, California,
January 16, 1942.

Respectfully submitted,

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(Appendix Follows.)

Appendix

RE SUPPLEMENTARY OPINION TO DECISION OF CIRCUIT COURT OF APPEALS (7th) IN CHICAGO, MILWAUKEE, ETC. R. R. CO. REORGANIZATION.

The full text of the supplementary opinion referred to in Note 27a at p. 15 (ante) will not be available to us within the time allowed for the completion of this brief. Our only information is a press dispatch appearing, under the date line of January 13, 1942, in the Wall Street Journal (Pacific Coast edition) of January 14, 1942. So far as can be determined from this dispatch, the effect of the supplementary opinion is that, with respect to the elimination of the stock equity, the Commission, in its further investigation, is not required to make findings beyond the finding that the equity has no value—*"unless it is convinced that changed conditions in railroad earnings warrant it"*. (Italics ours.) The clear implication is that as further hearing and investigation must be had in any event because of the lack of findings necessary to support other provisions of the plan, changed conditions appearing at the time of such further hearing may be considered. These changed conditions relate to increased earnings since the making of the Commission's report.

In its opinion of December 8, 1941, the court which decided the Milwaukee case made two declarations which sharply differentiate that case from the present one:

(1) It was said that evidence of an increase in earnings of the railroad, relied on by the stockholders, was not in the record. On the contrary, in the instant case, by express order of the District Court, made on the stipulation of all parties, the monthly and yearly statements

showing combined results of the operation of the properties of the debtor and its subsidiaries for the period subsequent to that covered by the evidence before the Commission, were filed and were made a part of the record on appeal (R. 2627-2632). Such statements, down to the end of September, 1941, are included in Volumes VII and VIII of the record (R. 2633-2838; 2641, 2644, 2646, 2649, 2652, 2654, 2656).

(2) That even if this evidence were considered, it would not, with the other evidence in the case, support a finding of value in the stock.

In the present case, the earnings record for the period following the original and the modified report of the Commission shows a striking and continuous increase in the earnings of the debtor's properties—an increase vastly greater, relatively, than that relied on by the stockholders in the Milwaukee case. Briefly stated, the adjusted earnings of the system available for interest in 1939 showed an increase of 563.04% over 1938; for 1940 there was a further increase over 1939 of earnings (unadjusted) of 81.41%; for the nine months of 1941 included in the record the earnings (unadjusted) available for fixed charges (R. 2656) increased from $933,533.00 in the comparable period of 1940 to $2,958,189.00, or an increase of 216.87%.

It is impossible to believe that the Commission, in the further investigation which it must make in any event, would, or properly could, close its eyes to this radical change of conditions affecting earnings, and stand upon the findings made by it several years ago that the unsecured claims and the stock equity are without value.